

FACT FINDER REPORT STATE EMPLOYMENT
RELATIONS BOARD
Before the
State Employment Relations Board
State of Ohio

2003 DEC -1 A 10: 27

November 28, 2003

In the Matter of:

FRATERNAL ORDER of POLICE,
LODGE No. 36

Employee Organization

and

The CITY of MIDDLETOWN, OHIO
Employer

Cases Nos. 03-MED-08-0816
and 03-MED-08-0817

I. HEARING:

DATE: November 10, 2003, 9:00 a.m.

LOCATION: Middletown City Hall

ATTENDANCE:

For the Employee Organization:

Susan D. Jansen, Attorney, Logothetis, Pence & Doll
Stephen Grismeir, Attorney, Logothetis, Pence & Doll
Steve Winters, President, Lodge No. 36
John Magill, Past President, Lodge No. 36
Richard Bush, Bargaining Committee Member
Ed Sensel, Bargaining Committee Member
Dave Kirsch, Bargaining Committee Member
William Smallwood, Bargaining Committee Member

For the Employer:

Donald L. Crain, Attorney, Frost Brown Todd
Joe Scholler, Attorney, Frost Brown Todd
Sara E. Mills, Assistant Law Director
Ron Olson, City Manager
Col. William Becker, Police Chief
Maj. Michael Bruck, Deputy Chief of Police
Maj. Mark Hoffman, Deputy Chief of Police

Fact Finder:

James L. Ferree

INTRODUCTION:

The City of Middletown, Ohio (herein called “the Employer” or “the City”) employs approximately 436 employees. The City’s police department of 145 employees includes 73 patrol officers in one collective bargaining unit, and 13 supervisors (9 sergeants and 4 lieutenants) in another unit. Fraternal Order of Police Lodge No. 36 (“the Employee Organization” or “the Union”) was certified to represent the patrol officers on April 26, 1984, and was certified for the unit of sergeants and lieutenants March 28, 1985. The City and the Union have been parties to a series of nearly identical labor contracts covering these units, the most recent of which expired simultaneously October 31, 2003.

The parties met and bargained, and reached agreement on many issues. These agreements are hereby incorporated into this report, and it is recommended that they be included in the collective bargaining agreement.

During negotiations, the parties failed to reach agreement on 27 issues. The undersigned was appointed by the State Employment Relations Board (“SERB”) to serve as Fact Finder in this matter, pursuant to Ohio Revised Code (“ORC”) Section 4117.14(C)(3). A fact-finding hearing was conducted November 10, 2003.

II. MEDIATION:

At the fact-finding hearing, the Fact Finder and the parties reviewed the outstanding issues. The parties resolved 13 of the remaining issues, with the Union withdrawing nine proposals, and the Employer withdrawing one proposal. Further, the parties reached agreement in three areas: 1) the term of the new contract will be three years, from November 1, 2003 to October 31, 2005; 2) in the event that the City is unable to grant time off within 30 days of a request to use compensatory time off, employees will have the option of taking pay in lieu of the time, or of rescheduling the time off later; and 3) the parties agreed to make non-substantive “housekeeping” changes in the language of the previous agreement, correcting grammatical and spelling errors. Those agreements are hereby incorporated into this report, and it is recommended that they be included in the collective bargaining agreement.

The parties also agreed to extend the time for fact finding to Friday, November 28, 2003. Having considered the evidence presented at the hearing, the Fact Finder hereby issues his report and recommendations.

The remaining unresolved issues are:

Issue 1 - Article VII, Section 1: Wages

Issue 2 - Article VII, Section 6: Payment of Health Insurance Premiums

Issue 3 - Article VII, Section 6: Life Insurance

Issue 4 - Article VII, Section 4. h: Holiday Pay Conversion

Issue 5 - Article XI: Holidays

Issue 6 - Article IX, Section C: Personal Day

Issue 7 - Article VII, Section 4. c: Court Time

Issue 8 - Article VII, Section 7: Uniform/Clothing Allowance

Issue 9 - Article VII, Section 8: Canine Allowance

Issue 10 - Article XX: Injury Leave

Issue 11 - Article XVI: Layoff/Recall

Issue 12 - Article VI: Grievance Procedure

Issue 13 - Article XV, Employee Rights

Issue 14 - New Article, Part-Time Officers

III. CRITERIA:

Consideration was given to the criteria listed in Rule 4117-9-05 of the State Employment Relations Board:

(J) The fact-finding panel, in making findings of fact, shall take into consideration all reliable information relevant to the issues before the fact-finding panel.

(K) The fact-finding panel, in making recommendations, shall take into consideration the following factors pursuant to division (C)(4)(e) of section 4117.14 of the Revised Code:

(1) Past collectively bargained agreements, if any, between the parties;

(2) Comparison of the unresolved issues relative to the employees in the bargaining unit with those issues related to other public and private employees doing comparable work, giving consideration to factors peculiar to the area and classification involved;

(3) The interest and welfare of the public, the ability of the public employer to finance and administer the issues proposed, and the effect of the adjustments on the normal standard of public service;

(4) The lawful authority of the public employer;

(5) Any stipulations of the parties;

(6) Such other factors, not confined to those listed above, which are normally or traditionally taken into consideration in the determination of issues submitted to mutually agreed-upon dispute settlement procedures in the public service or in private employment.

IV. ISSUES AND RECOMMENDATIONS

Issue 1 - Article VII, Section 1: Wages

The recently-expired collective bargaining agreements include the following language:

There are hereby established the following bi-weekly pay ranges for certain members of the Division of Police within the service of the City.

PATROL OFFICERS

RANGE STEPS

EFFECTIVE NOVEMBER 1, 2002 (3.5%)

	A	B	C	D	E	F
Annual	\$37,946.48	\$39,733.20	\$41,598.96	\$43,548.96	\$45,601.92	\$47,741.20
Biweekly	\$ 1,459.48	\$ 1,528.20	\$ 1,599.96	\$ 1,674.96	\$ 1,753.92	\$ 1,836.20
Hourly	18.2435	19.1025	19.9995	20.937	21.924	22.9525

* * *

SERGEANTS

RANGE STEPS

EFFECTIVE NOVEMBER 1, 2002 (3.5%)

	A	B	C	D	E	F	G
Annual	\$43,292.08	\$45,348.16	\$47,447.04	\$46,022.00	\$52,039.52	\$54,483.52	\$57,046.08
Biweekly	1665.08	1744.16	1826.04	1911.68	2001.52	2095.52	2194.08
Hourly	20.8135	21.802	22.8255	23.896	25.019	26.194	27.426

RANGE STEPS

LIEUTENANTS

	A	B	C	D	E	F	G
Annual	\$49,703.68	\$52,039.52	\$54,483.52	\$57,046.08	\$59,728.76	\$62,511.25	\$65,474.24
Biweekly	\$ 1,911.68	\$ 2,001.52	\$ 2,095.52	\$ 2,194.08	\$ 2,297.28	\$ 2,405.28	\$ 2,518.24
Hourly	23.3960	25.0190	26.1940	27.4260	28.7160	30.0660	31.4780

Union Position:

The Union proposed wage increases of 4.25% in each of the first two years of a three year contract, with a reopening of negotiations on the wages in the third year.

Management Position:

The Employer proposed a three year contract, with a 2% wage increase in the first year, and reopening the contract for renegotiation of the wage article in the second year.

Findings of Fact:

The Employer argued in its pre-hearing statement that the City cannot afford any more than it has offered. The statement gave an overview of the City's recent finances, which was explained at the hearing by City Manager Ron Olson. Employer's counsel prefaced the budget description by placing it in the context of an economic downturn for the city's largest employer, AK Steel, and previous bargaining with other City employee unions during more prosperous times which resulted in wage increases that cannot be matched today. The cost of a 1% wage increase in the police collective bargaining units is calculated by the Employer at roughly \$55,238. The City would like to be able to offer more than a 2% increase to its police force, but it is unable to do so.

City Manager Olson recalled that the City's income tax revenue was sufficient to balance the budget through the mid 1990s. In the decade ended in 2002, the police received wage increases of 40.5%, as compared with increases of about 35% for other employees, while inflation rose slightly less than 26%. The City tries to maintain a fund balance of 15% to 25% as a four-month cushion, to offset any decline in revenues in the event of a cutback by AK Steel, for example, but the current projections indicate a zero balance a year and a half from now if the current spending patterns continue. Revenues have flattened out in recent years, and now show a slight decline. There is little which can be done to change the revenue patterns, Mr. Olson stated, because increases would depend on the outcome of a vote, which is especially uncertain in light of the recent passage of a school bond. Until a plan for growing the City's economy can take effect, the City must reduce its expenses.

The Police budget is included in the City's General Fund, as opposed to an enterprise fund which is self-supported by user fees. An Employer exhibit summarized the City's 2004 budget, which showed the General Fund balance dropping from about \$5.5 million to \$1.2 million this year. Mr. Olson showed two budget options which he prepared for the City Council meeting that night, including revenue enhancements and service reductions, little or no cost of living adjustment, a hiring freeze, elimination of staff in every department through attrition, and a reduction in the tax credit for residents who pay earnings tax to another jurisdiction. He pointed out that if the Council votes to increase

revenue through an income tax adjustment, the added revenue will not be realized until the spring of 2005, and that staff reductions by attrition will occur throughout the year. All departments have been asked to submit reduction plans, and the Police Chief's plan would reduce the department's operational costs by 9%.

Mr. Olson described the table showing monthly income tax collections; he said that the current lag in revenue, and an announcement by AK Steel that it will lay off 200 local salaried employees, lead him to believe that the trend of lower revenue will continue. Police department expenditures are the largest category in the General Fund, 38.4% as compared with 27.3 % for the Fire department and relatively small proportions for other departments.

Regarding the Union's material predicting an upswing in the economy, the witness testified that AK Steel's business lags the automobile industry, and cities lag the national economy by six to twelve months. He listed several Middletown employers which closed in recent years. At the same time, health care insurance costs have increased, and the City has instituted a 5% premium participation among employees, in place of a flat dollar amount. The City's financial plan, projecting revenues and expenditures several years into the future, assumes a cost of living cost for the bargaining unit employees; about 75% of the City's budget consists of personnel costs, so it is important to be realistic. At the time the fire department collective bargaining agreement was negotiated, the downward trend in revenues was not so clear.

The capitol budget continued to be funded by half of the income tax revenues until 1986, and it was funded into the nineties by the economic upswing, but jobs and income tax revenues have been lost since then. The addition of a new WalMart has produced revenue for the county, but what the City receives for 15 years goes to pay a bond for the road and bridge in that area. The Hospital employs about 1300 employees, and the City has retained that income tax base by helping finance its relocation within the City. Other investments by the City to develop the area after the Hospital opens in 2008 are intended to rebuild the City's economy.

On cross examination by the Union, the witness confirmed that money has been transferred out of the General Fund into the Capitol Improvement Fund. He also

confirmed that one report does not show flat revenue revenues in the last three years, but that is because it includes borrowing, as well as income tax receipts. He said the projection for 2003 revenue of \$18.5 million will not be met, and it is more likely to be somewhat more than \$17 million. The City anticipates revenues to grow by about \$1 million per year after that.

In 2002 the union contract for Fire department employees included a 3% wage increase, with some employees also benefiting from “a leveling out” by the elimination of a two-tier wage structure. Mr. Olson explained that the plan which he would propose to the City Council would save \$59,569 by a 2% cost of living increase in Police wages, rather than a 3% increase, for the entire department. He confirmed that the City plans to reduce the Police unit by four positions, but would not say which departments will lay off the other six employees. The Union argued that the Police department will be disproportionately affected by the planned layoff. When asked whether state and Federal funds will pay a substantial portion of the costs for the Hospital project, the witness agreed, and said that about \$13 million of the \$40 million will come from the City.

In addition to the testimony of the City Manager, the Employer presented documents comparing the City’s salary levels with 13 other jurisdictions, and a recent conciliation decision. The maximum salary for Middletown police officers (\$47,741.20 per annum) is slightly below the average of the other cities (\$48,432.83), and the lieutenants and sergeants top out slightly above the average of the same ranks in those comparable cities. In the April, 2003 conciliation award, which covered several thousand State of Ohio employees, the conciliator adopted the fact finder’s recommendation of no wage increase in the first and second years of the contract, and a 2% lump sum payment, which he characterized as a “bitter pill to swallow,” but a necessary one in view of the State’s dreadful fiscal condition. The City also offered several news accounts of the AK Steel developments.

Union Position on Wages

The Employee Organization first stated that the 86 employees represented by the Union are a smaller proportion of the City’s 436 employees (20%) than the proportion of layoffs projected (4 of 10 = 40%). The disproportionate impact on safety forces reflects

the City's priorities. Without minimizing the importance of capitol improvements, the Union said that the use of the General Fund is a matter of priorities. The Fire department's moderate wage increase was 3%, and the Police have historically received 3% to 3.5% increases. The City Manager said that the amount which would be saved by reducing the Police wage increase from 3% to 2% would be only \$300,000, an amount which he said would not substantially impact the City's budget, but it would be a substantial drop from the 3% which the Police have historically received. The capitol expenditures should not come out of Police salaries.

The Union has modified its original three year wage proposal to a two year proposal, with a re-opener in the third year, and has reduced its proposed wage increases to 4.25% effective November 1, 2003 and 4.25% on November 1, 2004. The Union proposes that the reopening of the wage issue should be pursuant to Ohio Revised Code Section 4117. (The Employer's counsel interjected that the City has no objection to that, and its difference is that the re-opener should occur after one year, and would include the health insurance premiums.)

The Union pointed out that its exhibits compare the City with seven similar-sized cities in Butler and adjacent counties, whose police are represented by a union. The Union objects to the inclusion of Newark and Mansfield in the City's list of comparable cities, because they are located in a different economic district. The Union submitted the fact finder's report of 1995, in which the neutral looked at both lists of comparables. The Employee Organization urged the fact finder to consider median household incomes of the comparable cities, as well as total population, and to take into account the number of years required to reach the top wage rates. All of the City's sergeants, and all but one of its lieutenants, are at the top of their pay ranges. The top wage of the City's patrol officers is 5.4% below the average of the other seven regional cities. Sergeants are 4.6% behind the regional average, and lieutenants are 2.1% behind. The Union argued that the external comparables support a wage increase of at least 3.5% if not 4.25%.

With respect to internal comparables, the Union showed that three bargaining units of City employees will receive 3.5% contractual wage increases in 2004, and about half of the Fire department bargaining unit is also benefiting from the elimination of wage

tiers. Two other units will receive 3.25% wage increases under their collective bargaining agreements.

General Fund data summarized in a Union exhibit reflect that in the 1990s the City had sufficient funds to transfer part of the General Fund into capitol expenses, and the end-of-year balance for 2002 is greater than it was in 2001, recovering to over \$7 million. The General Fund is a nebulous account subject to manipulation, but the balances are consistent with Governmental Fund data, neither of which show any dramatic reduction in funds.

The City's "Comprehensive Annual Financial Reports" (CAFRs) contain the data in the Union's summary, and they demonstrate that the underlying factors which support the optimistic outlook in their narratives are still present. In addition, Walmart has come in, and the Hospital is expanding. AK Steel has asked its union to discuss cutbacks; it looks as if the proposed management layoffs will be mostly by attrition. The most recent CAFR, for the year ended December 31, 2002, shows that income tax receipts are not declining; rather, they spiked in 2000 but have otherwise remained steady over five years. The CAFR's table on the major governmental funds shows a General Fund remaining unreserved fund balance, or "rainy day fund," growing in 2002; if the City Manager's prediction about a revenue decline proves to be accurate, this is the fund which ought to be turned to, to weather the rainy day. The CAFR's table 2, "General Governmental Revenues by Source," shows a ten year trend of increasing municipal income tax revenues through 2002.

In the December 2002 Monthly Financial Report of Major Funds, it is seen that the City had projected a budget shortfall of \$1.265 million, but actually, the revenues exceeded expenditures by over a half million dollars, and the unencumbered balance was over \$7 million instead of the projected \$5.7 million. This may indicate a propensity for the City to make pessimistic projections. The City's 2003 budget document reported that the desired 25% cushion for emergencies stood at 23%. While the City is focusing on income taxes, the property tax revenue is projected to increase by 10%.

In the City's Financial Plan 2004, as revised September 2003, the Employer assumes a 3.5% wage increase for Police and Fire employees in 2004, and a 3% increase for all

employees in 2005 and 2006. City Council was able to find funds to pick up the City Manager's pension fund contributions, and it should be able to find funds to pay their Police employees the increase they deserve.

The Union submitted newspaper articles suggesting that the economy is rebounding. When the City's finances recover, if they are actually in bad shape now, then the Police employees will be behind in their wages, and it will be impossible to make up for it.

Employer's Response

The City repeated that it did not want to finance its deficit on the backs of the police employees, but some relief in the form of a 2% wage increase, or a delayed increase as occurred in the past, would help to minimize layoffs. AK Steel is the economic juggernaut of Middletown, and is seriously considering whether to invest money in plant improvements necessary to continue to make steel here. If they shut down their steel-making operation (the "hot end") it will mean the loss of 1000 jobs. Their layoff of 200 people by the end of this year will cost the City over \$300,000 in income tax revenue. The Union's list of comparable cities does not include a single city with the economic challenge facing Middletown. The CAFR reports cited by the Union are not a true measure, because accounting rules require that they must include borrowed funds. The best barometer is the actual receipt of income tax funds, which provide 78% of the revenue, followed by intergovernmental funds which are down significantly because the State of Ohio is in bad shape.

The Financial Plan for 2004 is a worst case scenario, so it assumes large wage increases in order to be prepared for hard times. As the former president of the Union, Police Chief Becker would not let the City treat his officers unfairly. However, the City cannot take everything available and put it into wages. Maybe the City should have said "no" to employees earlier, but it would be negligent not to stem the flow now. The City has under spent for capital improvements in the past, and it is catching up with us. The fact finder who ended the two-tier wage system in the Fire department may have made a mistake, as the system was working. The Police employees received 1.5% more in wage increases than the Fire employees in the last ten years, and the City's wage proposal is fair.

Union Response

The internal comparable data which shows that the Fire employees received only 3% in the past contract is incorrect, in light of the fact that over half of them received more than that with the abolition of the two-tier system. AK Steel is working to cushion the effect of management layoffs, and is looking into how it can keep the hot mill working, under State air pollution guidelines. With respect to the selection of comparable cities, no two cities are the same, and Middletown's problems are different but not worse than the others.

It feels like the City is asking Police officers to bear a disproportionate share of the load when four of the ten proposed layoffs are in their unit. The Union opposes any delay in the effective date of a pay increase; there has been none since November 2002, and any delay will cause a loss of pay which can never be made up. The tragedy of September 11, 2001 resulted in a greater appreciation for our safety forces, and it is astounding to find Police officers in a position of fighting to maintain parity with other City employees.

Fact Finder Recommendation and Rationale:

I am bound to consider factors set forth in the statute, among which are "The interest and welfare of the public, the ability of the public employer to finance and administer the issues proposed, and the effect of the adjustments on the normal standard of public service." Although the City's worst fears may never come to pass, it has made a case for restraint in spending, beginning with this contract. The size of the Police department's share of the General Fund is large enough to make an impact, for better or for worse. While the Employer has some latitude to shift funds, that ability is not without limits. Even the internal and external comparable wage data do not make a compelling case that these units are in need of a catch-up increase this year. On balance, I find that the Union's expectation that the "historical" 3% to 3.5% wage increases will continue is unrealistic at this time.

I am convinced, therefore, that the wage increase effective November 1, 2003 should be limited to 2%, as proposed by the City. Due to the uncertainty of the data on which the economic forecast is based, and the prospect that the future may be more predictable

in a year, I am also persuaded to recommend that the collective bargaining agreements should be reopened on the issue of wages for the second and third years of the contracts.

Recommendation:

It is recommended that the parties include the following language in their contracts.

In the Patrol Officers' Agreement:

**ARTICLE VII
WAGES**

Section 1.

There are hereby established the following biweekly pay ranges for certain members of the Division of Police within the service of the City

PATROL OFFICERS

EFFECTIVE NOVEMBER 1, 2003 (2.0%)

<u>RANGE</u>	<u>STEPS</u>					
	A	B	C	D	E	F
Annual	\$38,705.41	\$40,527.86	\$42,430.94	\$44,419.94	\$46,513.96	\$48,696.02
Biweekly	\$1,488.67	\$1,558.76	\$1,631.96	\$1,708.46	\$1,789.00	\$1,872.92
Hourly	\$18.60837	\$19.48455	\$20.39949	\$21.35574	\$22.36248	\$23.41155

Sixty (60) days prior to November 1, 2004, the parties agree to re-open the contract for the purpose of negotiating wages contained in this Agreement. The re-opening of the Agreement for wage negotiations shall invoke the dispute settlement procedure set forth in O.R.C. 4117.14. The results of the negotiation process or any settlement reached between the parties or any determinations ordered by a Conciliator will become effective November 1, 2005.

In the Sergeants' and Lieutenants' Agreement:

ARTICLE VII

WAGES

Section 1.

There are hereby established the following biweekly pay ranges for certain members of the Division of Police within the service of the City

EFFECTIVE NOVEMBER 1, 2003 (2.0%)

RANGE

STEPS

SERGEANTS

	A	B	C	D	E	F	G
Annual	\$44,157.92	\$46,255.12	\$48,395.98	\$46,942.44	\$53,080.31	\$55,573.19	\$58,187.00
Biweekly	\$1,698.38	\$1,779.04	\$1,862.56	\$1,949.91	\$2,041.55	\$2,137.43	\$2,237.96
Hourly	\$21.22977	\$22.23804	\$23.28201	\$24.37392	\$25.51938	\$26.71788	\$27.97452

LIEUTENANTS

	A	B	C	D	E	F	G
Annual	\$50,697.75	\$53,080.31	\$55,573.19	\$58,187.00	\$60,923.34	\$63,761.48	\$66,783.72
Biweekly	\$1,949.91	\$2,041.55	\$2,137.43	\$2,237.96	\$2,343.23	\$2,453.39	\$2,568.60
Hourly	\$23.8639	\$25.5194	\$26.7179	\$27.9745	\$29.2903	\$30.6673	\$32.1076

Sixty (60) days prior to November 1, 2004, the parties agree to re-open the contract for the purpose of negotiating wages contained in this Agreement. The re-opening of the Agreement for wage negotiations shall invoke the dispute settlement procedure set forth in O.R.C. 4117.14. The results of the negotiation process or any settlement reached between the parties or any determinations ordered by a Conciliator will become effective November 1, 2005.

Issue 2 - Article VII, Section 6: Group Health Insurance Premiums

The recently expired collective bargaining agreement included the following:

Section 6. – Payment of Insurance Premiums

All coverage shall be subject to the insurance company's requirements and eligibility.

(a) Members shall be entitled to participate in the City's Health Insurance Program described in Appendix A.

* * *

APPENDIX A HEALTH INSURANCE

1. Members shall be provided medical insurance coverage in accordance with the plan document on file in the Finance Department.
2. Member contribution:
 - (a) Member contribution for medical coverage will not exceed 10% of the estimated annual cost of the City's medical insurance plan. Annual member drug and dental contribution increases from 1989 forward will not exceed 5% annually.
 - (b) Effective January 1, 1995, the member shall contribute to the annual cost of the City's medical insurance plan as follows:
 - Family Plan - \$16.73 per month
 - Single plan - \$13.47 per month
3. If the City's total cost for its health care plan in any given year exceeds the total cost for the prior year by more than 8%, (effective November 1, 1996, this will increase to nine percent 9%), employees shall pay this excess amount, subject to the limitation set forth in paragraph 2-a above. The amount in excess of 8% increase, if any, shall be apportioned among the health care plan members as follows:
 - (a) Each employee with a family contract shall pay 2.5 times the amount that an employee with a single contract pays
 - (b) The total excess cost (above the 8% which the City pays) will be divided among the plan members as follows:

The total number of single contracts, and 2.5 times the total number of family contracts will be added. This sum shall then be divided into the excess cost. The result of this division will be the cost of a single contract. That cost will be multiplied by 2.5 to determine the cost of a family contract
 - (c) During the term of this agreement, the amount due under paragraph 2(b) of this Appendix shall not exceed \$30.00 per month for a family plan or \$25.00 per month for a single plan.

Management Position:

The City proposes that bargaining unit members pay health insurance premiums based on a 5% formula, and have co-pays and deductibles consistent with the City's insurance plan for non-organized employees. The Employer proposes the following language:

The employee/member contribution, which shall be 5% of the actual annual cost of the City's medical insurance plan from the previous year shall be calculated as follows:

y = employee share of the cost of single plan
 2.5y = employee share of the cost of a family plan
 (No. of family plans x 2.5y) + (No. of single plans x y) – Total cost of Health Insurance Coverage in previous year X .05 (5%)

e.g. Calculation for 2003

73 single plans
 354 family plans
 \$3,621,009 (actual 2002 costs)
 $(354 \times 2.5y) + 75 \times y - \$3,621,009 \times .05$
 $958y = \$181,050$
 $y = \$188.99$
 $2.5y = \$472.48$

This employee/member contribution shall be payroll deducted in equal installments not less than one time per month.

The City also proposed the following table:

CO-PAY AND OUT-OF-POCKET EXPENSES

Effective 10/1/03

<u>Item</u>	Current Member Cost (\$)	Proposed Member Cost (\$)
Single Coverage – Monthly contribution	25	15.74 (based on 5% formula)
Family Coverage – Monthly contribution	30	39.36 (based on 5% formula)
Physician visit Co-Pay (In Network)	5.00	10.00
Physician visit Co-Pay (Out of Network)	10.00	15.00
Prescription Co-Pay (generic)	4.00	8.00
Prescription Co-Pay (brand name with no generic equivalent or prescribed "dispense as written")	4.00	15.00
Prescription Co-Pay (other brand drugs – the difference in cost between the brand name and its generic equivalent	4.00 plus difference	10 plus the difference
Prescription Co-Pay by mail order (generic)	5.00	10.00
Prescription Co-Pay by mail order (brand name with no generic equivalent or prescribed "dispense as written")	10.00	25.00

Effective 1/1/04

Calendar Year Deductible*

Per Covered Person (network)	0	\$200
Per Covered Person (non-network)	0	500
Per Family (network)	0	400
Per Family (non-network)	0	1000

	Current Member Cost	Proposed Member Cost
Co-Insurance Limit Per Calendar Year		
Per Covered Person - network	\$200	\$300
Per Covered Person - non-network	\$500	\$500
Per Family – in network	\$400	\$600
Per Family - non-network	\$1,000	\$1,000
Total Out of Pocket Limits Per Year (Deductible Plus Co-Pay)		
Per Covered Person – in network	\$ 200	\$ 500
Per Covered Person - non-network	\$ 500	\$ 1,000
Per Family – in network	\$ 400	\$ 1,000
Per Family - non-network	\$ 1,000	\$ 2,000

Union Position:

The Union proposed to add a paragraph (f) to Section 6 of Article VII, and to replace nearly all of the Appendix, as follows:

(f) In the event the City investigates alternate forms of health insurance or carriers, the Union will be consulted prior to any change in carriers or forms of coverage. Current levels of insurance benefits will remain the same for the term of this agreement. In the event the City creates a task force or committee to study alternate forms of health insurance, the Union President will be invited to become a member of such task force or committee.

* * *

APPENDIX A

HEALTH INSURANCE

1. Members shall be provided medical insurance coverage in accordance with the plan document on file in the Finance Department.
2. Member contribution:
 - (a) A member's contribution for medical coverage shall be 5% of the estimated annual cost of the City's medical insurance plan.
 - (b) Members shall pay the following co-pays and coinsurance:

Doctor's Visits: \$10 in network/\$15 out of network;

Prescriptions: \$7 generic/\$15 brand name non-generic (where brand name is requested by member, pharmacy may collect difference between the cost of generic and brand name);

Maximum Annual Out of Pocket (excluding the above co-pays): \$500 single/\$1,000 family in network; \$800 single/\$1,600 family out of network;

The above-listed employee premiums, co-pays and coinsurance limits shall become effective at such time and to the extent that they are implemented for the City's non-union employees.

The employee/member contribution, which shall be 5% of the actual annual cost of the City's medical insurance plan from the previous year shall be calculated as follows:

y = employee share of the cost of single plan
 $2.5y$ = employee share of the cost of a family plan
(No. of family plans \times $2.5y$) + (No. of single plans \times y) – Total cost of Health Insurance Coverage in previous year \times .05 (5%)

e.g. Calculation for 2003

$$\begin{aligned} & 73 \text{ single plans} \\ & 354 \text{ family plans} \\ & \$3,621,009 \text{ (actual 2002 costs)} \\ & (354 \times 2.5y) + 75 \times y - \$3,621,009 \times .05 \\ & 958y = \$181,050 \\ & y = \$188.99 \\ & 2.5y = \$472.48 \end{aligned}$$

This employee/member contribution shall be payroll deducted in equal installments not less than one time per month. The 2004 employee monthly contribution for the family plan will be \$39.36 and for the single plan will be \$15.74.

- (c) During the term of this Agreement, the amount due under paragraph (b) of this Appendix shall not exceed \$49.36 per month for family plan and \$25.74 per month for the single plan in 2005. The monthly contribution shall not exceed \$59.36 per month for the family plan and \$35.74 per month for the single plan in 2006.

Findings of Fact:

The Employer offered an October 2002 report by Hewitt Associates titled *Health Care Cost Increases Expected to Continue Double-Digit Pace in 2003* which predicted, "unless there is a fundamental change in the way health care is delivered, costs will double in the next five years." Hewitt's 2002 data show that the Cincinnati area was among the cities with the highest rate increases, 13 %. The Employer's insurance premium over the last three years has increased over 45%. The City's share of the cost of monthly single coverage went up from \$221 in 2000 to \$322 in 2003, and its part of the monthly premium for family coverage went from \$490 to \$712 in the same period. The employee's share of the cost has been capped at \$25 for single coverage and \$30 for family coverage, per month.

The City is trying to go to a uniform 5% premium share for all its employees, and a uniform schedule of deductibles and co-pays. The Employer asks that the Police employees do the same. The Fire department employees' contract was based on estimates, and their arrangement differs slightly, but as each bargaining unit's next contract is settled, the City wants to bring them in line with the model.

The State Employment Relations Board 2002 *11th Annual Report on the Cost of Health Insurance in Ohio's Public Sector* shows that public employees in southwest Ohio are contributing a lot more toward the cost of their health insurance than the City is asking of its employees, but the City Manager did not want to ask too much of the employees, and decided to limit the increase to 5%. With such a favorable deal on their health insurance, the bargaining unit employees will still come out relatively well, even with a smaller wage increase. In the April 2003 conciliation report involving 8400 State employees, who got no wage increase for the next two years, their premium share was increased from 10% to 15%. As the Conciliator wrote, it is common to find employees paying 20% of the cost in the private sector.

The Employer favors reopening the contract for another look at health insurance premiums after a year, which will be around the same time as the Fire employees' contract has a re-opener for this subject. At that time, the City may have a better idea of what the insurance costs will be.

Sara E. Mills, the City's Assistant Law Director, was called by the Employer to testify. She described a document showing examples of a family's costs for health care under the present system and under the City's proposed system, under three scenarios. Under the present plan, the maximum annual co-pay is \$400 per year for the family. Under the new plan, the family has an annual deductible of \$400 which must be satisfied before the insurance begins paying; after that, the employee's family pays 10% of the remaining costs, up to the annual out-of-pocket limit of \$1000. She explained that the intent is to cover situations where a family might have large medical expenses in a year, yet keep the overall costs in control. She stated that the monthly premiums, doctor visit co-pay, and prescription co-pay have been in effect for unrepresented employees since October 1, 2003, and the deductibles, co-insurance, and out-of-pocket limits will take effect on January 1, 2004. This is the plan approved by City Council for all employees, she said. She pointed out some differences of co-pay amounts for prescriptions under the Fire contract. Through the first ten months of 2003, the total cost to the City for employee health insurance coverage has been \$3,004,972 (an annual rate of \$3.6 million), and next year is budgeted for \$4.4 million.

The Union said that its proposal is the same as what the City agreed to with the Fire employees' bargaining unit. The language proposed in the new paragraph (f) tracks the Firefighters agreement. The old language of Appendix A covers the formula for calculating the insurance premiums, which were capped at \$30 per month for a family plan and \$25 per month for a single plan (although employees are paying less than the cap – about \$17 – for single coverage).

The Union proposes to use the Employer's 5% formula, and the co-pays as they appear in the Firefighters agreement, while maintaining the protection of a cap, which has been in the Police contract since 1991. The Union's proposal includes the same premiums as the City is proposing for 2004: \$39.36 for a family plan, and \$15.74 for single coverage. In 2005, the Union proposes to cap the second year costs at ten dollars per month more than in 2004, and in 2006 the Union proposes that employees' monthly premiums go up another ten dollars per month. The Union wants to keep the cap because of the uncertainty about the amount of the wage increase under the new contract.

The Union submitted a document showing the health care costs borne by seven comparable cities within two counties of Middletown; their average portion of the cost of family plans is 93.6%, and of single plans it is 96.5%. Another document sets forth the history of the parties' health care insurance cost sharing over eight contracts from 1984 to 2002. The Union introduced a comparison of wage increases at various percentages, showing the hourly and monthly dollar increases of the average wages for each rank, and the net effect on the average earnings of each rank after the monthly health insurance premium is offset by \$39.36. The employees need wage increases of 3.5% to receive a net increase in take home pay of at least 3.0% in the first year of the contract. The impact of an insurance premium of \$49.36 in the second year is even greater. The Union pointed out that the City's other bargaining units are paying smaller premiums than the Union has agreed to, which makes the Union's request for caps even more valid.

Sgt. John McGill, past president of the Union, stated that the Police employees are looking for uniform coverage, which means the same terms as agreed upon with the Fire employees. Other groups of employees have vision coverage, but Police have not had it;

this is not uniform coverage. If the witness gets a wage increase, and a large portion of it is deducted for the health insurance premium, the benefit of the pay raise is diminished.

Steve Winters, current president of FOP Lodge No. 36, complained that his request for information to prepare for bargaining was not readily complied with. He said that the data for 2002 showed that the Fire unit collected \$1,660,000 in health insurance benefits, whereas the Police unit collected only \$807,000, which is 48% less. The Police usage of health insurance is less, so this unit should not be expected to pay more, and it should have a cap on premiums.

The City pointed out the legal problem with requesting medical information from an insurance company, and said the City forwarded the Union's request to the insurance company and passed the information along to the Union when it was received. Insurance usage in any particular year can vary widely, depending on whether an employee has a catastrophic injury or illness. The Union is not asking for the same thing as the Fire department, because the Fire department employees do not have a cap on their contributions. The City is sensitive to the employees' needs, and is therefore proposing only a 5% share of the cost, taking an incremental approach. The City said it would like to have a cap on its costs, too.

The Union said that there are other benefits in the Firefighters agreement, for which their union dropped its request for a health insurance premium cap. With a premium contribution of 5% of the total cost, increasing the cap \$10 per month in the second and third years has the effect of covering the unit employees' share of total costs even if those costs increase \$1000 per month, which seems unlikely.

Fact Finder Recommendation and Rationale:

The City has done a good job of providing its employees with affordable health insurance, and the Union is wise to accept the City's basic terms.

The problem both parties face is the uncertainty of future costs. In the past three years, the total costs have risen an average of 15% per year, and the experts project that those costs can be expected to rise 15.4% again in 2003. The City has budgeted about 22% more for 2004 than it is on track to spend in 2003. It appears to the undersigned,

from the foregoing evidence, that the City is exercising an abundance of caution, and that it is unlikely to cost even 18% more than in 2003.

If, in a worst case scenario, costs were to rise by 18%, then the total cost of the coverage in 2004 would be \$5,041,892.20. Based on that assumption, and assuming the same numbers of employees participate in the plans, the employees' 5% share in the cost would be \$263.15, or \$21.93 per month for single coverage, and \$657.87, or \$54.82 per month for the family plan. Thus, the Union's proposed cap of \$25.74 for single coverage and \$49.36 per month for a family plan provides nearly enough funds to cover even the worst case scenario, for 2004.

Extending the scenario one year further, in the unlikely event that health care costs rise yet another 18% in 2005, the City's cost could be \$5,949,433. In that case, and assuming again that the same numbers of employees participate in the plans, the employees' 5% share in the cost would be \$310.51, or \$25.88 per month for single coverage, and \$776.28, or \$64.69 per month for the family plan. The Union's proposed cap of \$35.74 per month for single plans will easily accommodate this projected cost, and the proposed cap of \$59.36 per month for family plans would cover 90% of the actual amount of a 5% share of the cost.

I conclude that, if the Union's proposed caps were instituted, the City would run very little risk of getting any less than 5% of its health care costs covered by employee premiums. Maximum employee premiums, or caps, have been in the Police collective bargaining agreements since 1987, and they should not be removed by a fact finder, if the parties do not agree to do so. Therefore, I will recommend including the caps, as proposed by the Union.

With respect to the Union's proposals which track the language in the Firefighters' collective bargaining agreement, the City has made no objection to the inclusion of the new paragraph (f) in Article VII, Section 6, which would require the City to maintain current levels of coverage, and to include the Union in any investigation or committee for the purpose of considering alternate forms of health insurance. If the Fire employees are afforded such an opportunity, it naturally follows that the Police employees should receive equal treatment.

It is unclear to me whether the City intended to include the table, above, listing physician visit co-pays, calendar year deductibles, etc., in the body of the collective bargaining agreement or in Appendix A. The Union's proposed paragraph (b) in Appendix A, which follows the bargain struck between the City and the Fire employees' union, covers some of the same fees. It appears from the testimony that the Fire employees got a slightly better deal, based on the preliminary estimates available at the time, than is available to the unrepresented employees. The Union's proposal provides, "The above-listed employee premiums, co-pays and coinsurance limits shall become effective at such time and to the extent that they are implemented for the City's non-union employees." It occurs to the undersigned that this language is likely to conflict with the first section of Appendix A, which provides, "Members shall be provided medical insurance coverage in accordance with the plan document on file in the Finance Department." It seems likely that the plan document filed in the Finance Department will be consistent with the City's table of fees, rather than the fees in the Fire employees' contract. The previous agreement did not include a schedule of monthly premium payments, co-pays, deductibles, etc., and I see no advantage to burdening this contract with these details, especially when they are prone to change over a three-year period.

Recommendation

I recommend that the parties include in their agreement the following new paragraph (f) of Section 6 of Article VII:

(f) In the event the City investigates alternate forms of health insurance or carriers, the Union will be consulted prior to any change in carriers or forms of coverage. Current levels of insurance benefits will remain the same for the term of this agreement. In the event the City creates a task force or committee to study alternate forms of health insurance, the Union President will be invited to become a member of such task force or committee.

* * *

I further recommend that the parties replace the Appendix A in the recently expired Agreement with the following:

APPENDIX A
HEALTH INSURANCE

1. Members shall be provided medical insurance coverage in accordance with the plan document on file in the Finance Department.
2. Member contribution:

The employee/member contribution, which shall be 5% of the actual annual cost of the City's medical insurance plan from the previous year shall be calculated as follows:

y = employee share of the cost of single plan

$2.5y$ = employee share of the cost of a family plan

$(\text{No. of family plans} \times 2.5y) + (\text{No. of single plans} \times y) =$
Total cost of Health Insurance Coverage in previous year \times
.05 (5%)

e.g. Calculation for 2003

$$\begin{aligned} &73 \text{ single plans} \\ &354 \text{ family plans} \\ &\$3,621,009 \text{ (actual 2002 costs)} \\ (354 \times 2.5y) + 75 \times y &= \$3,621,009 \times .05 \\ 958y &= \$181,050 \\ y &= \$188.99 \\ 2.5y &= \$472.48 \end{aligned}$$

This employee/member contribution shall be payroll deducted in equal installments not less than one time per month. The 2004 employee monthly contribution for the family plan will be \$39.37 and for the single plan will be \$15.75.

During the term of this Agreement, the amount due under paragraph (b) of this Appendix shall not exceed \$49.36 per month for family plan and \$25.74 per month for the single plan in 2005. The monthly contribution shall not exceed \$59.36 per month for the family plan and \$35.74 per month for the single plan in 2006.

Issue 3 - Article VII, Section 6: Life insurance

Article VII, Section 6 of the recently expired Agreement included the following:

(c) All members shall receive \$15,000 group life insurance coverage paid by the City. Members may purchase additional group life insurance consistent with the carrier's available options. Double indemnity premiums shall be paid by the City on all coverage provided by the City.

Union Position:

The Union proposed the following language:

(c) All officers shall receive \$20,000 group life insurance coverage and supervisors shall receive \$22,500 paid by the City. Members may purchase additional group life insurance consistent with the carrier's available options. Double indemnity premiums shall be paid by the City on all coverage provided by the City.

Management Position:

The City opposed the Union's proposal.

Findings of Fact:

The Union pointed out that Police employees have had no change in the amount of their life insurance coverage (\$15,000) since 1989, that six of the seven comparable cities in the region have \$25,000 or more life insurance, and that the Fire employees' current contract provides \$20,000 life insurance for fire fighters and \$22,500 for officers.

The Employer said that the City cannot afford to add unnecessary expenses to its budget, as much as it would like to accommodate its Police employees. The City conceded that this is one of the less expensive of the Union's proposals, but contends that this is the wrong time to increase this expense.

Fact-Finder Recommendation and Rationale:

I am persuaded by the evidence of the practice in comparable cities, and the Employer's contract covering Fire employees, that the Police bargaining unit employees are due for an increase in their life insurance coverage. This is not a big cost item, so the City's economic condition should not stand in the way of granting this benefit. Therefore, I will recommend that the Union's proposed language be included in the collective bargaining agreement.

Recommendation

It is recommended that the Union's proposed Article 3, quoted in full above, be included in the contract.

Issue 4 - Article VII, Section 4.h.: Holiday Pay Conversion

The recently expired collective bargaining agreement provided:

- h. In December of each year, members of the Division of Police shall have the option to request the exchange of up to three (3) holidays annually for their equivalent in salary, provided:
 1. approval must be given by the Chief of Police and City Manager;
 2. there must be unused funds available in the Division of Police Salary Budget for payment.

Union Position:

The Union proposed to change the month from December to November, and to increase the number of holidays from three (3) to twelve (12).

Management Position:

The City proposed to modify the contract language as follows:

In December of each year, members of the Division of Police shall have the option to request the exchange of up to three (3) holidays annually for their equivalent in salary. Officers who become eligible for the DROP program shall have a one-time option to exchange up to an additional nine (9) holidays for their equivalent in salary in December of the first year such member is eligible for the DROP. All holiday exchanges are subject to the following conditions:

1. Approval must be given by the Chief of Police and City Manager; and
2. There are unused funds available in the Division of Police Salary Budget for payment. In the event unused funds are not available to meet all requests for holiday exchange, preference will be given to DROP eligible members and the distribution of such exchanges shall be at the discretion of the Chief of Police.

Findings of Fact:

The Union said that the Chief approached Union leaders at the end of 2002, on behalf of some employees who wanted to cash in more than the three holidays, and the Union agreed to it. The converted hours become pensionable income, for purposes of retirement, and add to the employee's income when calculating their "high three" years. The Union proposes to make this benefit available to all members, and to keep the "conditions precedent," which require management's approval and availability of funds. The City agreed in contract negotiations with the Fire employees to give them 132 hours of compensatory holiday time off annually, and to allow those employees the option, once

per month, of exchanging 132 hours of holiday time earned, but not taken, for pay, without requiring the preconditions which are in the Police contract.

Under a police and fire pension system enhancement called Deferred Option Retirement Plan (DROP), an employee with at least 25 years' service and age 48 could "drop out of" the retirement system, freezing his pension at that rate, and continue working. Pension funds accumulate interest in an account which can be collected as a lump sum upon retirement. Unused holidays cannot be cashed upon retirement, so it is advantageous to change the banked time into pensionable income, and thus increase the average salary of the highest three years, upon which the monthly pension payment is calculated. The Fire division has had this benefit, at 96 hours per year, and increased it to 132 hours in the current contract. Instead of using the holiday bank for terminal leave, it is now better to cash it out.

The City said it is concerned that there will not be sufficient funds to grant all requests, and that its proposal would give priority to DROP-eligible employees. There are substantial differences in how Fire employees accrue holidays, and are permitted to use holidays. Chief William Becker clarified the events leading to him seeking an ordinance permitting DROP-eligible Police employees to cash in 12 holidays. The City Ordinance adopted in December 2002 says:

Any employee who is eligible to participate in the Deferred Option Retirement Plan (DROP) on or prior to December 31, 2003, may in December 2002 cash in an additional nine (9) days of accumulated holiday leave, for a total of twelve (12) days. If the employee does not enter DROP in 2003 the employee shall not be eligible for the payout of additional accumulated holiday leave, as permitted by the ordinance or subsequently authorized by a collective bargaining agreement, again during their employment. . . . For said purpose, the Director of Finance is hereby authorized to expend a sum of money not to exceed \$23,604.26 from the General Fund, which said amount is hereby appropriated.

The Union objected to tying the ability to convert unused holidays specifically to the DROP program, when there are already restrictions requiring management approval and availability of funds. The Fire employees' agreement is not restricted in this manner.

Fact-Finder Recommendation and Rationale:

Paid holidays are an earned benefit, and if an employee is unable to take the time off because of scheduled duties, he or she should be compensated. The Employer's proposal is an incremental change from the previous system, giving priority to employees who join

the DROP program. The Union's proposal is more accessible to other employees, who are not joining DROP. There was no explanation why the Union wished to change the timing of the conversion from December to November.

In my opinion, there is a possibility, under the Union's proposal, that all available money will be paid out to non-DROP employees, on a first-come, first-serve basis, and that the employees joining DROP, who would benefit most immediately from converting their unused holidays to cash, could be shut out because of lack of funds. The City's proposal has the advantage of reserving first claim on the funds to the DROP-eligible employees for whom it is the greatest benefit. I will therefore recommend adoption of the Employer's proposal.

Recommendation

It is recommended that the parties include the City's proposed Article VII, Section 4.h., quoted in full above, in their collective bargaining agreement.

Issue 5 - Article XI: Holidays

The recently-expired contract included the following language:

This is an earned benefit. The following days shall be celebrated as paid holidays by all members:

- | | |
|------------------------|----------------------------|
| New Year's Day | Thanksgiving Day |
| Martin Luther King Day | Day after Thanksgiving Day |
| Good Friday | Christmas Eve |
| Memorial Day | Christmas Day |
| Independence Day | Member's Birthday |
| Labor Day | |

Effective January 1, 2001, each member employed as of the same date shall earn an additional holiday. Effective January 1, 2002, this additional holiday will become a fixed day designated by the City Manager and shall be earned annually by all members who are employed on the date so designated.

Each member shall be able to accumulate unlimited holidays.

* * *

Union Position:

The Union's proposal adds President's Day and Veteran's Day to the list of holidays and deletes the paragraph which follows the list.

Management Position:

The City proposes to remove bolded language after the specific listing of holidays, and list President's Day in the holiday listing.

Findings of Fact:

The Union explained that the City Manager designated President's Day as the holiday referred to in the paragraph after the list of holidays, above, and that the Union is proposing to make Veteran's Day the thirteenth paid holiday. The Employer agreed, at the hearing, to add President's Day to the list of paid holidays, and to delete the paragraph following the list. The Union presented a history of personal leave days and holidays which showed that Police officers enjoyed 11 holidays from 1991 to 2000, and have had 12 holidays since then (they have also had one personal day since 1989). The average number of paid holidays for the seven regional comparable cities is 11, and their average number of personal days is 4.

The City said that the cost of an additional paid holiday or personal day is about equal to a 1% increase in wages. Police receive the same number of holidays as other City employees. In addition, other employee groups will want another holiday if the Police get one.

Fact-Finder Recommendation and Rationale:

I will recommend inclusion of President's Day in the list of paid holidays, and deletion of the bolded paragraph following the list, as both parties have proposed. I will not recommend adding a thirteenth paid holiday to the list because neither the internal comparables (other city employees) nor the external comparables (with the exception of one city) have more than twelve. This unit added a paid holiday in 2000, and there was no evidence that another is needed.

Recommendation

It is recommended that the parties amend their contract's list of paid holidays to include President's Day, and to delete the bolded paragraph following the list of holidays.

Issue 6 - Article IX, Section C: Personal Day.

The recently expired collective bargaining agreement includes the following:

Personal Day. All members covered by this contract, shall be granted one personal day each year. The personal day must be used in the calendar year granted, and cannot be carried over to subsequent years or accumulated or banked in any manner. The personal day shall not count toward the 40 hour breakover point. This day will be scheduled in the same manner as vacation and longevity days.

Union Position:

The Union proposes to add a second personal day.

Management Position:

The City opposes the addition of another paid personal day off.

Findings of Fact:

The Union said that there has been one personal day in the contract since 1989. Among the seven comparable regional cities, no other city has only one day, and the average among them is four days. The City said that no other City employees have more than one personal day, and the Police also have “longevity days” which provide two additional paid vacation days after five years’ service, three days after ten years, etc. The Union responded that the employees are behind in vacation days, even including longevity days, but the Union decided to seek another holiday and another personal day, instead of expanding their vacation days.

Fact-Finder Recommendation and Rationale:

Inasmuch as the parties have not agreed to change this benefit, and there has been no showing of a pressing need to impose it on the City, I feel that the fact finder should not upset the arrangement which was inserted into the contract by agreement of the parties, in the past. Therefore, I will recommend that there be no change in this section of the parties’ collective bargaining agreement.

Recommendation

It is hereby recommended that the parties include in their new agreement the existing language of the recently expired contract, quoted above.

Issue 7 - Article VII, Section 4. c: Court Time.

The recently expired contract includes the following language:

Members will receive hourly pay for actual time worked with a minimum of three (3) hours’ pay for any job connected court appearance while off duty as a witness in a criminal, civil, or juvenile prosecution. If a member is held in court over three (3) hours, he shall be compensated for the additional hours. If a court appearance is scheduled one hour or less immediately before an officer’s shift, he shall be paid overtime for that period. If a court appearance is scheduled up to one hour following the end of his shift, he shall be paid overtime for the period of time from the end of his shift until relieved by the Court. In both situations, payment would be made in accordance with the paragraph “a” of this section.

Union Position:

The Union's proposal is indicated in bold, in the following:

Members will receive hourly pay for actual time worked with a minimum of three (3) hours' pay for any job connected court appearance while off duty **on a regularly scheduled workday** as a witness in a criminal, civil, or juvenile prosecution. If a member is held in court over three (3) hours, he shall be compensated for the additional hours. **Employees will receive four (4) hours' pay for any job-connected court appearance on a regularly scheduled day off. If an employee is held in court over four (4) hours, he shall be compensated for the additional hours.** If a court appearance is scheduled one hour or less immediately before an officer's shift, he shall be paid overtime for that period. If a court appearance is scheduled up to one hour following the end of his shift, he shall be paid overtime for the period of time from the end of his shift until relieved by the Court. In both situations, payment would be made in accordance with the paragraph "a" of this section.

Management Position:

The City opposes the requested change.

Findings of Fact:

The Union asks to compensate an employee for the inconvenience of being called in on his day off, by guaranteeing him another hour at time and a half. The officers are subpoenaed by the City's Prosecutor's Office, and miss their day off because the City requires them to come in to court. The Union feels that the employees are behind in the number of days off, and they should be compensated differently if they lose a day off than if they are merely in court while off duty on a scheduled work day. When an officer is called to Warren County court, there is a 40 minute drive from headquarters, so they must spend an hour in preparation and driving time. Officers may have to make special child care arrangements when called to court on their day off. The compensation for court time has not changed since 1989, but the call-in pay arrangement was changed by a fact finder in 1994. Comparable regional cities have varying arrangements.

The City pointed out that it cannot control a court's docket. The inconvenience of going to court whenever it is scheduled for trial comes with the job. Three hours is the norm for court call-in time. In any event, the City cannot afford to pay more for this item.

Fact-Finder Recommendation and Rationale:

Inasmuch as the parties have not agreed to change the longstanding arrangement which they originally agreed to put into their collective bargaining agreement, I feel that a

fact finder should not disturb this arrangement unless it is not working. Since there was no showing of a serious problem which requires the fact finder to attempt to force a solution on the parties, I will recommend that this section of the parties' collective bargaining agreement not be changed.

Recommendation

It is hereby recommended that the parties include in their agreement the same language as appeared in the recently expired contract, as quoted above.

Issue 8 - Article VII, Section 7.: Uniform/Clothing Allowance

The recently expired agreements included the following (differing only in the terms enclosed in brackets):

(b) Non-Uniformed Police Personnel

Each eligible non-uniformed [Patrol Officer/Sergeant or Lieutenant] of the Division of Police shall be paid a maximum of \$500 annually to cover individual expenses for wearing apparel. Said amount is to cover future individual expenditures for wearing apparel and will be paid to officers who have been assigned non-uniformed positions effective January 15 and July 15 of each year, in equal installments of \$250 each, payable on January 15 and July 15 of each year the officer is so assigned.

(c) Clothing and Equipment Maintenance Allowance

Each member shall be paid \$175.00 as a clothing and equipment maintenance allowance effective January 15 and July 15 of each year.

Union Position:

The Union proposes to change the maximum annual wearing apparel payment from \$500 to \$800, and the semi-annual amounts from \$250 to \$400; and raise the clothing (uniform) and equipment maintenance allowance from \$350 to \$500 per year.

Management Position:

The City opposes the request.

Findings of Fact:

The Union pointed out that the uniform and equipment maintenance allowance has been \$350 per year since 1987, and that the average allowance of the seven comparable regional cities is \$682 (all but one pays at least \$650). The detectives' non-uniformed clothing allowance increased from \$400 to \$500 in the 2000 – 2003 Agreement, but the average allowance of the seven comparable regional cities is \$849, and only one of them pays less than the City. Uniform maintenance includes repairs and cleaning. Some

uniform items are not provided, such as work boots, which cost more than they did ten years ago. The City has a policy of replacing worn-out or destroyed uniforms.

The City suggested that some cities require officers to use uniform allowances to buy replacement uniforms, and others do not. The Union's proposal would cost the City \$18,600 at a time when the money is not available.

Fact-Finder Recommendation and Rationale:

I find the external comparable data persuasive that the City is falling behind in an area where neighboring jurisdictions have supported their Police officers at a rate in keeping with the cost of living. The cost of cleaning a uniform, buying work boots, etc., has certainly increased since the allowance was set at \$350 in 1987; the money the City has saved on these items should now be paid back to the Police employees. I will recommend that the Union's proposed language be included in the parties' collective bargaining agreement.

Recommendation

It is hereby recommended that the parties include in their agreements the following, inserting the appropriate titles from the bracketed portion into each document:

(c) Non-Uniformed Police Personnel

Each eligible non-uniformed [Patrol Officer/Sergeant or Lieutenant] of the Division of Police shall be paid a maximum of \$800 annually to cover individual expenses for wearing apparel. Said amount is to cover future individual expenditures for wearing apparel and will be paid to officers who have been assigned non-uniformed positions effective January 15 and July 15 of each year, in equal installments of \$400 each, payable on January 15 and July 15 of each year the officer is so assigned.

(c) Clothing and Equipment Maintenance Allowance

Each member shall be paid \$250.00 as a clothing and equipment maintenance allowance effective January 15 and July 15 of each year.

Issue 9 - Article VII, Section 8: Canine Allowance.

The recently expired Agreement included the following language:

Members who are designated as canine officers shall be paid \$4.00 per day as compensation for expenses associated with the care of their dog while at home. Such payment shall be made in \$730 installments on January 15 and July 15 of each year. In recognition of the fact that canine officers spend time caring for their dogs while at home, they will be required to be physically present at the police division for only 7.5 hour of the 8 hour shift.

Union Position:

The Union proposed to increase the canine allowance from \$4 to \$5 per day.

Management Position:

The City opposes the proposal.

Findings of Fact:

The Union said that the \$4 daily compensation has been in effect since at least January, 1996. The allowance is intended to pay for feeding and caring for the dog, as well as cleaning the officer’s carpet and furniture. Veterinary expenses are not paid out of the allowance. There are two canine officers in the Police Division.

The City said that the canine program was cut from three to two because of its cost. The Chief testified that he believes the \$4 daily canine allowance is sufficient.

Fact-Finder Recommendation and Rationale:

In the absence of any hard evidence regarding this matter, I am unwilling to recommend that the provisions of the parties’ collective bargaining agreement be changed. There was no data on which to base a conclusion that there is a need for change, and the parties are not in agreement regarding the proposed change.

Recommendation

It is hereby recommended that the parties include in their agreement the language of the recently expired contract, quoted above.

Issue 10 - Article XX: Injury Leave.

The recently expired Agreement included the following:

B. An employee who suffers an on-the-job injury shall receive up to one hundred and fifty (150) working days of injury leave.

1. Injury leave shall be used consecutively from the date of the injury, except that if an employee has not exhausted the leave for an injury, he/she may take such leave for the same injury at anytime **within two (2) years of the on-the-job injury**. However, any such non-consecutive use of injury leave shall be available only after the employee uses five (5) consecutive days of sick leave before each such non-consecutive use of injury leave, except where such nonconsecutive use occurs within seven (7) calendar days of the date of injury. In no event shall injury leave be available more than two years after the initial date of the injury.

* * *

E. An aggravation or re-injury of an existing injury or condition shall be treated as part of the original injury, and shall be subject to the limitations in paragraph B of this Article. The employer retains the right to require written

evidence of the aggravation or re-injury from the employee's physician. This provision is subject to paragraph D of this Article. [Emphasis added.]

Union Position:

The Union proposed to strike the phrase, “within two (2) years of the on-the-job injury,” from Section B. 1., at lines 3 and 4; and to add a phrase to Section E (in bold here), making it read as follows:

E. An aggravation or re-injury of an existing injury or condition shall be treated as part of the original injury, and shall be subject to the limitations in paragraph B of this Article **unless the injury is sustained as a result of another documented incident.** The employer retains the right to require written evidence of the aggravation or re-injury from the employee's physician. This provision is subject to paragraph D of this Article.

Management Position:

The City's proposal for Section B would reduce the maximum 150 working days of injury leave to 120 days, and expand the two-year period for leave for the same injury to four years. It would change the required five consecutive days of leave to three. Thus, Section B would read as follows:

B. An employee who suffers an on-the-job injury shall receive up to **one hundred and twenty (120)** working days of injury leave.

1. Injury leave shall be used consecutively from the date of the injury, except that if an employee has not exhausted the leave for an injury, he/she may take such leave for the same injury at anytime within **four (4)** years of the on-the-job injury. However, any such non-consecutive use of injury leave shall be available only after the employee uses **three (3)** consecutive days of sick leave before each such non-consecutive use of injury leave, except where such nonconsecutive use occurs within seven (7) calendar days of the date of injury. In no event shall injury leave be available more than **four (4)** years after the initial date of the injury.

The City would leave Section E unchanged, and would change the reference in G.1. from “all 150 days of injury leave” to 120 days. Finally, the Employer proposed a new section, which reads as follows:

H. Employees who are injured while at work who are under the influence of alcohol or drugs, as prohibited in Article XIV of this Agreement, or whose violation of City safety rules or policy is a direct or proximate cause of such on the job injury, are not eligible for injury leave under this Article.

Findings of Fact:

The Union pointed out that the two-year limit on an injury in paragraph B is insufficient when a recurring symptom flares up, as can happen with a knee injury, for example. In Paragraph E, the proposal would apply if a second incident triggers a re-

injury of the same sort. **President Steve Winters** testified that Police officers are penalized for on-the-job injuries, and they have to use up sick time which they should be able to bank. Over his career, Officer Winters has suffered a fractured leg in one incident, a fractured arm in a second incident, and another fractured leg in an auto accident, resulting in five surgeries and continuing care for his knee. He has lost close to a thousand hours of sick time due to aggravation of pre-existing injuries. The limitations of the contract language penalize officers for just doing their job. The Union observed that junior officers who are injured do not have a bank of sick leave to fall back on.

The City said that injury leave, and sick leave take a variety of forms, but their purpose is to make sure an employee is protected against loss of income. The same is true for workers compensation, which makes a three-tiered benefit package. As a result of the Union's concerns, the City has proposed to change the two-year window to four years. Some of the contract language the Union objects to was written by their Union predecessors to deal with abuse of sick and injury leave by a former employee. A unique restriction in the language has to do with re-injury: when an employee goes on leave again after returning to work for a period, he must use up five days of sick leave before going back on injury leave. The Employer is willing to reduce that requirement to three days of sick leave. The City can make these changes if the total number of injury leave days is reduced from 150 to 120. The City also proposes to exclude employees from injury leave if they are injured while under the influence of alcohol or drugs, which is consistent with court cases regarding eligibility for workers comp if injured while under the influence of alcohol or drugs.

The Union responded that it hopes to provide more injury leave, not less, as the City proposes by cutting the total available from 150 to 120 days per injury. When there is a problem with an employee abusing the leave privilege, there are ways to deal with that employee's behavior without restricting the whole program. Workers Comp is not a viable option because it provides less than 100% of the employee's salary. When the Employer proposes, in its new section, to deny injury leave to an employee whose on-the-job injury is caused by a violation of safety rules, it raises an issue which may sometimes be settled only by litigation or arbitration of the "proximate cause" of an injury. The new

language would cause more problems than it solves. The City already tests for drug use, and there is no problem in this area which needs fixing.

The City asserted that an employee who has an accident while under the influence of alcohol or drugs should not be entitled to injury leave. The City said that the Union's proposal in Section E creates an exception which swallows up the entire rule. It would do away with the re-injury or aggravation requirement. Calling an incident "documented" simply means it was reported on a piece of paper, and the proposed language opens up Pandora's box.

The Union explained that the intent of the language is to indicate that when an officer is injured, he has to fill out an injury report. If an officer injures a knee simply stepping out of a cruiser, that is not an injury for which he will fill out an injury form; it will not be another documented incident, but rather it will be a re-aggravation of an existing injury. The intent is to indicate a specific incident in the line of duty, an event which causes an injury. The Chief recalled that this same discussion occurred in previous contract negotiations, and it always comes down to relying on a doctor to assess an injury and finding ways to balance protection for an employee against prevention of abuse of the benefit.

Fact-Finder Recommendation and Rationale:

Inasmuch as the parties are in agreement that the injury leave language needs to be improved, and differ in significant details, I will recommend that a solution blending their proposals to accommodate their concerns be included in the parties' collective bargaining agreement.

Recommendation

It is hereby recommended that the parties include in their agreement the following language:

B. An employee who suffers an on-the-job injury shall receive up to one hundred and fifty (150) working days of injury leave.

1. Injury leave shall be used consecutively from the date of the injury, except that if an employee has not exhausted the leave for an injury, he/she may take such leave for the same injury at anytime within four (4) years of the on-the-job injury. However, any such non-consecutive use of injury leave shall be available only after the employee uses three (3) consecutive days of sick leave before each

such non-consecutive use of injury leave, except where such nonconsecutive use occurs within seven (7) calendar days of the date of injury. In no event shall injury leave be available more than four (4) years after the initial date of the injury.

* * *

E. An aggravation or re-injury of an existing injury or condition shall be treated as part of the original injury, and shall be subject to the limitations in paragraph B of this Article. The employer retains the right to require written evidence of the aggravation or re-injury from the employee's physician. This provision is subject to paragraph D of this Article. An employee who suffers an on-the-job incident or accident resulting in a new injury to a previously injured area of the body will be eligible for the full benefit described in paragraph B of this article.

* * *

H. Employees who are injured while at work who are under the influence of alcohol or drugs, as prohibited in Article XIV of this Agreement, are not eligible for injury leave under this Article.

Issue 11 - Article XVI: Layoff/Recall.

The recently-expired collective bargaining agreement included the following:

A. Layoff. In the event the City should lay off police personnel, the member(s) with the least seniority shall be laid off first in accordance with Stat of Ohio Civil Service Law. Seniority, for the purpose of this agreement, shall be the total time of current, continuous service within the bargaining unit. In the event a member is laid off, he shall receive payment for earned but unused vacation and/or holiday (to include current calendar year) sick leave conversion, uniform maintenance, and clothing allowance with his termination pay.

Union Position:

The Union's proposal is the following:

A. Layoff/Bumping. In the event the City should lay off police personnel such lay offs shall be solely in accordance with this Article and in lieu of any provisions in Chapter 124 of the Ohio Revised Code or any conflicting provisions of the City Charter or City policy. For the purpose of this agreement, seniority shall be the total of service within a sworn police position with MPD less any time, which constitutes a break in service. For layoff purposes only, seniority shall constitute time in rank, subject to the provisions herein.

1. Patrol officers with the least seniority shall be laid off first.

2. In the event the City should reduce the number of police supervisors, the supervisors with the least time in rank shall bump to the next lower rank

3. In the event the City should reduce the number of Deputy Chiefs, such Deputy Chief shall bump to the lower rank of Lieutenant. A Deputy Chief reduced in rank shall bump the Lieutenant with the least amount of time in grade. A Lieutenant reduce in rank shall bump the Sergeant with the least amount of time in grade and a Sergeant reduced in rank shall bump the least senior Patrol Officer. A supervisor bumped into a lower supervisory rank will be placed in the lower rank based upon the employee's total time as a supervisor for the Middletown Police Department. Once bumped into the patrol rank, the bumped member shall become the senior ranking officer in the patrol rank for the purposes of recall only. For layoff purposes, the employee bumped into the

patrol rank is placed according to his departmental seniority. This bumping procedure shall continue until no lower rank exists.

4. An employee who is reduced in rank shall be reinstated to their previous rank in reverse order of bumping and before any competitive test is given for a supervisory opening.

5. In the event a member is laid off; he shall receive payment for earned but unused vacation and/or holiday (to include current calendar year) sick leave conversion, uniform maintenance, and clothing allowance with his termination pay.

Management Position:

The City opposes the Union's proposed change.

Findings of Fact:

The Union said that the parties had expended much time and energy on this issue, and were close to agreement, but the City wanted a kind of super-seniority for a deputy chief who bumps back into a lieutenant rank, or a lieutenant who bumps back into a sergeant rank. The Union proposes, "A supervisor bumped into a lower supervisory rank will be placed in the lower rank based upon the employee's total time as a supervisor for the Middletown Police Department" (paragraph 3, above). The parties discussed whether the Union agreed to a super-seniority provision. The Union objected that a situation could arise in which a supervisor bumps into a patrol officer position, and a patrol officer with more departmental seniority than the bumped supervisor could be laid off if the bumped supervisor had super-seniority.

The City raised two problems with the Union's proposal: a bumped sergeant could be working with a patrol officer on whom he had conducted an internal investigation; and without super-seniority, a bumped supervisor might be passed over when his position is filled again, thus wasting the City's investment in his supervisory training.

Fact-Finder Recommendation and Rationale:

Inasmuch as the parties are apparently close to reaching an agreement in this area, I will recommend compromise language to be included in the parties' collective bargaining agreement.

Recommendation

It is hereby recommended that the parties include in their agreement the following:

A. Layoff/Bumping. In the event the City should lay off police personnel such lay offs shall be solely in accordance with this Article and in lieu of any provisions in Chapter 124 of the Ohio Revised Code or any conflicting provisions of the City Charter or City policy. For the purpose of this agreement, seniority shall be the total of service within any sworn police position with MPD, less any time which constitutes a break in service. For layoff purposes only, seniority shall constitute time in rank, subject to the provisions herein.

1. Patrol officers with the least seniority shall be laid off first.

2. In the event the City should reduce the number of police supervisors, the supervisors with the least time in rank shall bump to the next lower rank.

3. In the event the City should reduce the number of Deputy Chiefs, such Deputy Chief shall bump to the lower rank of Lieutenant. A Deputy Chief reduced in rank shall bump the Lieutenant with the least amount of time in grade. A Lieutenant reduce in rank shall bump the Sergeant with the least amount of time in grade. A Sergeant reduced in rank shall bump the least senior Patrol Officer. A supervisor bumped into a lower supervisory rank will be placed in the lower rank based upon the employee's total time as an employee of the Middletown Police Department. Once bumped into the patrol rank, the bumped member shall become the senior ranking officer in the patrol rank for the purposes of recall only. For layoff purposes, the employee bumped into the patrol rank is placed according to his departmental seniority. This bumping procedure shall continue until no lower rank exists.

4. An employee who is reduced in rank shall be reinstated to his or her previous rank in reverse order of bumping and before any competitive test is given for a supervisory opening.

5. In the event a member is laid off, he or she shall receive payment for earned but unused vacation and/or holiday (to include current calendar year) sick leave conversion, uniform maintenance, and clothing allowance with his termination pay.

Issue 12 - Article VI: Grievance Procedure.

The recently expired contract included the following provision:

Step 3. The grievance shall be presented to the City Manager or his designee no later than seven (7) calendar days after the receipt of an unacceptable decision rendered at Step 2, or within seven (7) calendar days after the seven (7) calendar day period in which the response is due. If the grievance is not so presented, it will not be further considered. A meeting shall be scheduled within seven (7) calendar days after the filing of the grievance at Step 3. The decision shall be given within seven (7) calendar days of said meeting. If the aggrieved member does not notify the City Manager or his designee through the President of the FOP of his dissatisfaction with the decision rendered, the grievance shall be considered resolved. If the City Manager or his designee fails to answer in writing within the seven (7) calendar days, the grievance will be presumed to have been denied.

Step 4.

* * *

The Arbitrator shall be chosen from a listing provided by the Federal Mediation and Conciliation Service or the American

Arbitration Association. The listing may be requested by the FOP and/or the City and the selection if the parties cannot agree shall be by striking method.

* * *

PARAGRAPH I - Discipline includes reduction in pay or position, removals, and suspensions, with or without pay and written reprimands. Written reprimands may be kept in a member's personnel file for up to two years. After two years if no further disciplinary action has been taken against the member, the written reprimand will be expunged from his file. After expungement, a reprimand cannot be used for any purpose.

Union Position:

The Union's proposal is the following:

Step 3. The grievance shall be presented to the City Manager or his designee, no later than seven (7) calendar days after the receipt of an unacceptable decision rendered at Step 2, or within seven (7) calendar days after the seven (7) calendar day period in which the response is due. If the grievance is not so presented, it will not be further considered. A meeting shall be scheduled within seven (7) calendar days after the filing of the grievance at Step 3. **At this meeting the Lodge will be afforded the opportunity to present all evidence it deems relevant including evidence of past infractions of any work rules, regulation, duty, responsibility, or policy which have been condoned by management and arguments regarding the employee's length of service. The evidence and arguments shall be considered by the City Manager or the designee in rendering the decision.** The decision shall be given within seven (7) calendar days of said meeting. If the aggrieved member does not notify the City Manager or his designee through the President of the FOP of his dissatisfaction with the decision rendered, the grievance shall be considered resolved. If the City Manager or his designee fails to answer in writing within the seven (7) calendar days, the grievance will be presumed to have been denied.

Step 4.

* * *

The Arbitrator shall be chosen from a listing of **fifteen (15) names** provided by the American Arbitration Association. The listing may be requested by the FOP and/or the City and the selection and **hearing procedures** shall be in **accordance with AAA rules.**

* * *

PARAGRAPH I Discipline includes reduction in pay or position, removals, and suspensions, with or without pay and written reprimands. Written reprimands may be kept in a member's personnel file for up to two years. After two years if no further disciplinary action has been taken against the member, the written reprimand will be expunged from his file. **Reductions in pay or position and suspensions may be kept in an employee's personnel file for up to four (4) years provided no further disciplinary action has been taken against the employee.** After discipline has been expunged, it cannot be used for any purpose. **The Chief may, in his discretion, expunge an employee's record of discipline earlier than the time limits prescribed.**

Management Position:

The City opposes the Union's proposal, except that it would agree to limiting the arbitrator selection to a list of 15 arbitrators from AAA, and conducting the hearing according to AAA rules, as set forth in the Step 4 language proposed by the Union, above.

Findings of Fact:

The Union stated that the City has placed unique limitations on the topics which can be argued at step 3 of the grievance procedure, resulting in the City Manager's designee declining to hear amelioration arguments. Thus, the City Manager's designee excluded some evidence which the Union also could not put before an arbitrator. Paragraph B, Section 7. of the collective bargaining agreement limits the evidence which an arbitrator can hear (no condonation, length of service, etc.). The Union proposed to change that, but backed up to step 3 so the argument can be presented to the City Manager's designee, instead. A step 3 grievance hearing on discipline for alleged insubordination and excessive force was held before the City Manager's designee, and the Union gathered substantial information which the designee would not accept.

The Union proposes to limit retention of discipline records involving a reduction in pay or position, or a suspension, in an employee's personnel file to four years, with discretion for the Chief to remove the records earlier. Written reprimands are not appealable to arbitration. Comparable cities permit disposal of reprimand records after a year or two, and suspension records after two or three years if there is no intervening discipline.

The City offered into evidence an excerpt from the March step 3 hearing, and the City Manager's designee's written report denying the grievance. The hearing officer wrote that he rejected "voluminous evidence on the issue of the appropriateness of the policy" about the use of hand strikes, recently adopted by the City, because "the hearing officer did not consider this issue an appropriate one in the grievance procedure." The City said that if there were a procedural error by the hearing officer, it is unfortunate, but is not a reason to change the collective bargaining agreement. The Union wants to be able to present evidence which the hearing officer may deem to be irrelevant. An

arbitrator may overturn discipline for lack of due process, if the hearing officer was wrong in excluding evidence of past practice under a previous, superceded, policy. The City Manager's designee has expressed regret at losing his temper, incidentally.

The current contract limits the removal of records from a personnel file to written warnings, which is fine, but sometimes an employee's full employment history is relevant. This has not been a problem, and the Chief already has discretion to remove an item from the file. Court decisions have established that public records cannot be destroyed pursuant to a labor agreement. In a case involving FOP Capital City Lodge No. 9 and the City of Columbus (100 Ohio St. 3d 192, Nov. 5, 2003) the Supreme Court of Ohio stated, "any provision in a collective bargaining agreement that establishes a schedule for the destruction of public records is unenforceable if it conflicts with or fails to comport with all of the dictates of the Public Records Act."

Fact-Finder Recommendation and Rationale:

Inasmuch as the parties agree on the change in the procedure for selecting an arbitrator in step 4 of the grievance procedure, I will recommend that it be included in the parties' collective bargaining agreement.

Although it is frustrating for a party to a grievance proceeding if the hearing officer declines to accept evidence, the City Manager's designee should be allowed discretion to run the hearing as he or she sees fit. In the event that the hearing officer commits an error in excluding relevant evidence, the Union has ready access to a remedy by presenting the evidence to an arbitrator at the next step. Therefore, I will not recommend the proposed change in the current step 3 language.

The proposed addition of language requiring or permitting that records of discipline be "expunged" from an employee's personnel file does not necessarily mean that such records will be "destroyed," which the Court order addresses. If the parties agree to remove prior discipline from consideration in determining the course of later discipline, I believe they are free to do so. Two of the seven comparable regional cities cited by the Union have collective bargaining agreements which permit removal of records of a suspension after two years, two of them permit removal after three years, and two retain the records permanently. Where the parties have not agreed to change the terms of their

agreement, and there is no clear showing that the practice is contrary to accepted norms, it is not the place of a fact finder to assist one party to mandate a change. Therefore, I will not recommend that the proposed change to Paragraph I be inserted into the contract.

Recommendation

It is hereby recommended that the parties include in their agreement the language of the recently expired agreement, and change the second paragraph of Step 4 to the following:

The Arbitrator shall be chosen from a listing provided by the Federal Mediation and Conciliation Service or the American Arbitration Association. The listing may be requested by the FOP and/or the City and the selection if the parties cannot agree shall be by striking method.

Issue 13 - Article XV: Employee Rights.

The recently expired contract reads as follows:

1. All contacts, verbal or written, be it disciplinary or any other, between a member and superior officer, shall be conducted in a calm, professional manner.
2. During the course of an investigation of member misconduct where discipline is likely to result to the effected member, the member may request the presence of a union representative during the investigating interview, provided the representative is reasonably available.
3. The member being interviewed shall be informed verbally of the nature of the investigation before the interview commences. The member shall be permitted to take notes of the interview.
4. When a member is being interviewed, where discipline may result, the member shall answer truthfully and completely all questions concerning the investigation posed to him by the interviewing officer. A member who refuses to answer such questions shall be informed that his refusal to answer constitutes insubordination and can be a basis for disciplinary action.
5. The City agrees not to suspend without pay, demote or discharge a member without first offering the member the opportunity to provide an explanation of the circumstances surrounding the charge brought against him, to the Chief of the Division of Police. The member may have an FOP representative, and his attorney, present during the meeting provided the individuals selected are reasonably available. Meetings, where practical, shall be conducted at hours reasonably related to the member's shift, preferably during the member's working hours.
6. Written notice of the charge(s) against a member, and a description of the nature of the evidence upon which the charge(s) is based shall be given the member in advance of the meeting described above.
7. All entries in personnel files relating to disciplinary action or performance shall be provided to the member by copy and such

member is entitled to place a letter of explanation or rebuttal to be attached to any entry so long as said explanation or rebuttal does not exceed 300 words in length and is submitted within 7 working days of the date the member is provided with the entry.

8. A member shall be provided a copy of his/her personnel file upon request if such member has been disciplined or is eligible for retirement. A copy of a member's file shall be provided to them at no cost no more than one time in any three year period.
9. A committee of no more than three (3) members of the bargaining unit, will meet with representative of management from time to time for the purpose of discussing subjects of mutual concern. Meetings may be requested not more than once every ninety (90) days, except upon agreement by both parties. There shall be no obligation upon the City or the Union to renegotiate working conditions, pay or any other policy or practice which may be the subject of such discussions. Meetings shall be limited to two hours' duration. The party requesting the meeting shall submit a proposed agenda in writing five (5) days prior to the scheduled meeting. Those items not considered during the Labor Management Meeting may be resubmitted in writing for agendas of subsequent meetings.

Union Position:

The Union proposed to strike paragraphs 2, 3, 6, and the portion of paragraph 8 after the words, "upon request." The Employee Organization also proposes to add the following:

2. When an employee, suspected of misconduct where discipline (defined as written reprimand, suspension, discharge or demotion) is likely to result to the affected employee, is interviewed as part of an administrative investigation or is scheduled for a hearing:
 - a. Notification of the interview or hearing shall be given to the employee reasonably in advance of the interview or hearing;
 - b. Interviews shall be conducted when the employee is on duty, if possible, or at a reasonable hour. Employees shall be compensated if the interview occurs off-duty at the applicable rate of pay.
 - c. The employee shall be advised of the allegation(s) or the subject of the investigation when formally notified and provided a copy of the complaint, if applicable;
 - d. The employee shall receive formal notice of the right to be represented by a grievance representative or attorney-at-law and the employee shall be given the opportunity to have a grievance representative or attorney provided such is reasonably available. If the employee waives his right to representation, the waiver will be in writing;
 - e. If the interview/hearing is to be tape recorded, the employee shall be apprised and receive a copy of the tape. The employee shall be permitted to take notes of the interview or tape record the interview;
 - f. In the interest of fair and expeditious corrective action, an employee who has allegedly committed a violation of a minor nature relating to his/her performance may be interviewed by Management prior to receiving an oral reprimand and/or retraining.

3. The employee has the right to waive 24-hours notice and representation. Management shall reserve the right to prohibit from an interview or hearing a representative who has been or will be questioned in connection with the case at hand.
4. Employees shall be afforded the right to Discovery subject to Paragraph 8.
5. An employee who is under criminal investigation shall be informed at the beginning of the interview that the investigation is criminal in nature, as opposed to administrative, and afforded the applicable Constitutional consideration guaranteed by law.

* * *

8. Pre-disciplinary hearings shall be scheduled to allow reasonable time for Discovery. A request for discovery shall be made in writing after the Notice of pre-disciplinary hearing has been issued but no less than five (5) work days before the hearing. Discovery shall be provided in a timely manner prior to the hearing and entitles the officer or either party to the following information:
 - a. The names of all known individuals who witnessed the incident(s) giving rise to the charges.
 - b. Copies of all reports, transcripts of interviews, written statements, recordings, photographs and any other documentary evidence regarding the incident(s) giving rise to the charges. Supervisory investigative reports shall be subject to discovery. The testimony of anonymous witnesses shall not be presented as evidence against the employee at the departmental hearing.
 - c. Either party also has the right to inspect any physical evidence or reproductions thereof regarding the incident(s) giving rise to the charges.

Discovery rights extend to the employee's representative. Should any new evidence develop during the hearing, a continuance shall be granted if requested by either party.

9. Once an employee is officially notified by the Police Department of an investigation against him/her, the Police Department will have four hundred eighty (480) work hours to either charge the employee with the misconduct or initiate disciplinary action.

Once the employee has been charged, management shall have two hundred eighty (280) work hours to hold a hearing and issue the determination to the employee. Work hours mean hours the employee is actually at work, excluding overtime work.

If the time limit expires and the employee is not charged, or no disciplinary action is imposed, or, the employee has not had a pre-disciplinary hearing, no disciplinary action will be taken.

Time limits can be extended by mutual agreement of the Lodge and Management. If criminal charges have been filed against an employee, the time limit will not be in effect until all criminal proceedings are complete.

In addition, the Union proposed to add a phrase to the first sentence of paragraph 4 of the recently expired contract, shown in bold here, so that it will read:

When a member is being interviewed in a **non-criminal matter**, where discipline may result, the member shall answer truthfully and completely all questions concerning the investigation posed to him by the interviewing officer.

A member who refuses to answer such questions shall be informed that his refusal to answer constitutes insubordination and can be a basis for disciplinary action.

The Union also proposes to add language to the final paragraph of this Article of the recently expired contract, providing that the committee of three members of the bargaining unit will meet with an equal number of representatives from management.

Management Position:

The City proposes to amend Sections 2 and 8 of the recently expired contract as follows:

Interviews will be conducted when an employee is on duty, if possible. Employees will be compensated if the interview occurs off-duty, at the applicable rate of pay.

A member shall be permitted to review a copy of his/her personnel file during regular business hours (8:00 a.m. to 5:00 p.m.), Monday through Friday, with 24 hours notice. Copies of the file will be made upon request at the officer's expense, consistent with the Ohio Public Records Act.

Findings of Fact:

The Union said that the purpose of its proposal is to ensure that the employees will have due process in any internal investigation, as is typically spelled out in police contracts. The employee should be entitled to notification reasonably in advance, and contemporaneous counseling even when no representation is needed. The Union said the City has conceded that the proposal conforms with the City's current practice. Discovery is allowed now, and is important to the employees, so the Union wants it in writing. The proposal includes a 480 hour time limit for the City to make a charge or to drop the matter; some other contracts also have time limits. Employees should be provided a copy of their files in such circumstances. The City asked, at the fact finding hearing, if the Union could agree to strike the 24 hour notice in Section 3, and the Union said it could.

The Union said that its aim is to ensure that employees' rights are respected. Now, a supervisor may initiate a friendly conversation with an employee, who is unaware that it is an interview, so he is off guard. That employee has a right to be notified of investigations. If the City can agree to other items, the time limit, and the reference to tapes could be dropped.

The City, in its pre-hearing statement, characterized the Union's proposal as "pernicious and potentially damaging" because it would place further restrictions on the

City's ability to investigate allegations of misconduct, and would restrict the Employer's ability to effectively manage the department. The proposed procedures would delay and hamper disciplinary investigations, and the procedures are not needed. Nevertheless, the City is willing to include in the contract the above language regarding scheduling of interviews during employees' duty hours, providing employees access to their personnel files, and making copies of their records upon request.

At the hearing, the Employer said that the Union's proposal represents a substantial change from the current City practice. There is a potential conflict of interest with lieutenants or sergeants disciplining other Union-represented employees. The City already observes all of the employees' Constitutional and State rights. As noted in the Employer's pre-hearing statement, the City is willing to change Section 8, which is quoted above. The Union's proposal in Section 2d expands the Employer's obligation beyond its legal responsibility; it is the Union's obligation to notify its members of their rights. The proposed discovery procedure conflicts with any possible criminal process, and it defeats the purpose of having arbitration of grievances. A discovery process could interfere with the completion of investigations. The proposed 280 hour limitation is unique, and could prevent completion of the investigation in a timely fashion. The Chief stated that there is already criticism about the Police policing the policemen, and there are already too many restrictions.

The City asserted that no need for the proposed changes has been demonstrated. The City is not unfair to the employees.

Fact-Finder Recommendation and Rationale:

Inasmuch as the parties have not agreed on changes in the language of their recently expired contract, I am reluctant to attempt to impose new language unless there is an obvious need for the change. Lacking such a showing that the present system is failing to serve the parties, I will recommend that the language of the previous agreement be continued in the parties' new collective bargaining agreement.

Recommendation

It is hereby recommended that the parties include in their new agreement the existing language from the recently expired collective bargaining agreement .

Issue 14 - New Article : Part-Time Officers.

Union Position:

The Union proposes the following new Article:

PART-TIME OFFICERS

The City shall not employ part-time employees to perform work customarily performed by full-time bargaining unit employees.

Management Position:

The City opposes the proposal.

Findings of Fact:

The Union wrote in its pre-hearing statement that it learned in the week before the fact finding hearing that the City plans to lay off four patrol officers, but will employ those officers on a part-time basis to perform work traditionally performed by full-time patrol officers. At the hearing, the Union objected to this plan, which would reduce bargaining unit employees' overtime opportunities.

The City called on Chief Becker, who said that the officers received advance notice before the City Manager told the Council. The budget eliminates four junior officers, but the department would offer them part-time employment to keep up their training and certification until they can be recalled. They would be paid out of the overtime budget.

The city argued that this issue is not properly before the fact finder because the parties' ground rules for negotiations required that all Union proposals would be on the table at the second bargaining session. Staffing is a management prerogative.

Fact-Finder Recommendation and Rationale:

It is not uncommon to include in a collective bargaining agreement some protection of the bargaining unit's work from assignment to supervisors, outsourcing, and contracting out. In Article II, Recognition, of the recently expired Patrol Officers contract, the City recognizes the Union as the collective bargaining representative of all Patrol Officers of the Police Division. That Article continues, "The bargaining unit shall include all persons employed in the rank of Patrol Officers." There is no indication that a Patrol Officer whose work week is less than 40 hours is no longer a member of the collective bargaining unit, although such an arrangement may fall afoul of Article VIII,

Hours of Work, which defines the work week as consisting of 40 hours. Thus, the proposed new article is not the traditional attempt to protect unit work.

The City may have a good argument, that it is empowered to use laid off Patrol Officers on a part-time basis, under the recently expired contract's Article IV, Management Rights, which reserves to the Employer the right to determine the size of the work force, to schedule the work, etc.

This matter had not been discussed between the parties at the bargaining table, and is not ripe for inclusion in the new contract by a fact finder. Presumably, the proper forum for this matter is a grievance procedure initiated by a Patrol Officer whose rights under the collective bargaining agreement are violated by assignment of overtime, which rightfully should be his, to a part-time, laid off Patrol Officer.

I will recommend that the proposed new article not be included in the parties' new collective bargaining agreement.

Recommendation

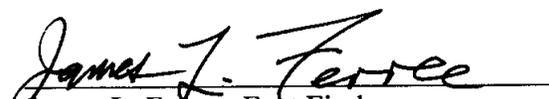
It is hereby recommended that the parties not include in their agreement the proposed new article titled Part time Officers.

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing Fact Finders Report regarding the findings of fact and recommendations on the unresolved issue has been sent by overnight mail carrier to the Employer's Representative Donald L. Crain, Attorney, at Frost Brown Todd LLC, 300 North Main Street, Suite 200, Middletown, Ohio 45042-1919; and to the Union's representative Susan D. Jansen, Attorney, Logothetis, Pence & Doll, Suite 1100, 111 West First Street, Dayton, Ohio 45402-1156.

A copy of the report has been sent by regular mail to Dale A. Zimmer, Administrator, Bureau of Mediation, State Employment Relations Board, 65 East State Street, 12th Floor, Columbus, Ohio 43215-4213.

Issued at Loveland, Ohio this 28th day of November, 2003.


James L. Ferree, Fact Finder